2019 IL App (1st) 170587-U

No. 1-17-0587

Order filed August 9, 2019

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 15 CR 9707
	)	
ANTONIO BASKIN,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Rochford and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion when it imposed a 30-year sentence for kidnapping where it appropriately considered all factors in aggravation and mitigation and the presentence investigation report was sufficient.

¶ 2 Defendant Antonio Baskin was charged by information with multiple counts of aggravated kidnapping, armed robbery, and unlawful use or possession of a weapon by a felon. Following a bench trial, defendant was found guilty of the lesser-included offenses of kidnapping and robbery, and sentenced to 30 years' imprisonment for kidnapping. On appeal, defendant

contends that his sentence was excessive because the court did not appropriately weigh the mitigating factors, did not impose a sentence with a rehabilitative aim, and relied on improper factors in aggravation. Additionally, defendant argues that the presentence investigation (PSI) report was inadequate because it lacked statutorily required information regarding opportunities for reintegration into the community. We affirm.

¶ 3 Defendant was charged by information of two counts of aggravated kidnapping (720 ILCS 5/10-2(a)(5) (West 2014)), two counts of armed robbery (720 ILCS 5/18-2(a)(1) (West 2014)), and two counts of unlawful use or possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2014)).

¶ 4 Before trial, the State filed a motion to allow evidence of four armed robberies defendant had committed at a Burger King restaurant where he used to work as proof of other crimes, where in three of the robberies, defendant had used objects that "appeared to be" firearms. The trial judge denied the motion, but noted that he presided in three of those cases.

¶ 5 At trial, Nicolas Zavala testified that on May 23, 2015, he was working at the Game Stop on 79th Street and Cicero Avenue with one other employee, Javier Andrade. At 8:30 p.m., a man wearing a hoodie sweatshirt and a mask entered the front door and went behind the counter, a few feet from the two employees. He held a handgun in his right hand and also carried a book bag. Zavala, who had a concealed-carry permit and had been "shooting guns for about four to five years," described the handgun as solid black and four inches long. The man told Zavala and Andrade to "play it cool" and "listen to what [he says]" so he would not "have to put a bullet in [them]." While he spoke, the man pushed the handgun against Zavala's body. According to Zavala, the handgun felt "cold," "heavy," and metallic.

¶ 6 The man asked Zavala to empty the contents of the cash registers and a safe that was beneath the counter into his back pack. Zavala emptied the cash registers, but the safe had a code which required a time delay before opening. As they waited for the safe to open, the man ordered Andrade to close and lock the front doors, and asked Zavala whether anyone was watching the store on a live video feed. The man also asked about the game systems the store sold, and whether Zavala had a vehicle. Zavala responded that he needed his vehicle for school and work, but the man told him to drive behind the store and that he would "give [him his] car back." As Zavala left the store, the man searched him to check whether he had a cell phone. Then, Zavala drove behind the store, exited his vehicle, and asked a passing motorist to call the police.

¶ 7 When Zavala returned to the store, the man instructed him to put the gaming systems in the vehicle and other video games into the man's bag and Andrade's bag. The safe then opened, and as Zavala removed the money from the safe, there was a knock at the front door. Zavala told the man that he thought an alarm went off, and the man ordered him to go to the back room to turn off the alarm. Zavala went to the back room, opened the rear door, and saw police officers who ordered him to leave the building. The State published surveillance footage from inside the store, which is included in the record and depicts events Zavala described, including when the man held the handgun against him.

¶ 8 The court asked Zavala whether the man ever indicated that he was going to hit Zavala with the firearm. Zavala responded that he was afraid of being shot, but there were no indications that the man was going to use the firearm in any other way. Zavala explained that he returned to the store after retrieving his vehicle because he "could not leave" Andrade behind.

¶ 9 Andrade testified to substantially the same events as Zavala. Andrade observed the masked man enter the store, point a black handgun at Andrade and Zavala, and hold the handgun against Zavala's ribcage. The man told Andrade and Zavala to not "do anything stupid" so "[h]e wouldn't have to put a bullet in [them]." Andrade added that, during the incident, the man ordered him to disconnect the phone line in the store.

¶ 10 Both Zavala and Andrade identified one of the State's exhibits, a BB gun, as the handgun used in the robbery.

¶ 11 Sergeant Corey Walker testified he responded to a call of a robbery in progress at the store. Through the window, he observed two individuals, one of them wearing a black hoodie, the other seemingly a store employee, and knocked on the door. As the hooded man ran into the back of the store, Walker ran around to the back of the building and encountered Zavala and Andrade exiting the building, followed by the hooded man who ran back inside. Walker entered the store's backroom and barricaded the door between the backroom and the store. On a video monitor in the backroom, Walker watched the man walk around the store carrying what looked to be a handgun, and feared that the man would shoot through the door. Other officers went to the front door, and approximately 10 minutes later, the man surrendered the weapon and was handcuffed. Walker removed the man's hoodie, saw his face, and identified him in court as defendant.

¶ 12 Detective Eric Chopp testified that he recovered the money, consoles, and video games from Zavala's vehicle. At the police station, Chopp read defendant the *Miranda* rights. Defendant acknowledged that he understood the rights, and said "I f***** up. You got me dead

right." He stated that he took a bus to the Game Stop, "watched" the store, and when he saw there were no customers, robbed it with a BB gun.

¶ 13 Later, Chopp was present when an assistant state's attorney Mirandized defendant a second time and he agreed to provide a written statement. In the statement, defendant added that he had "no people and no place to live," so he planned to "rob the Game Stop because he needed money for food and somewhere to stay and some clothes." Defendant also stated that he had taken the BB gun from someone on the street three or four days beforehand and walked into the Game Stop holding the gun by his side "because he did not want them to see it was a BB gun."

¶ 14 The State entered a certified copy of defendant's 2007 conviction for armed robbery with a firearm and rested. The defense rested without presenting evidence.

¶ 15 Following closing arguments, the trial judge stated that he "saw" and "felt the gun," which did not fire, and that it was debatable that it could be used as a bludgeon, and in fact it had not been used as a bludgeon. Consequently, the trial court found defendant guilty of the lesser-included offenses of robbery and kidnapping, and not guilty on the remaining counts.

¶ 16 The cause proceeded to a sentencing hearing. Defendant's PSI report showed that he was removed from his natural parents by the Department of Children and Family Services (DCFS) when he was around four years old, and adopted by another family at age five. He grew up on the south side of Chicago, in the Englewood neighborhood, where he and his brother were exposed to violence and were the only Latinos in the neighborhood. He last saw his biological brother in 2000 and has had no contact with his adoptive father or seven foster siblings. Defendant described his childhood as "brutal," and said that his adoptive father once beat his legs so severely that he "could barely walk for a month." Additionally, he reported "emotional

neglect" and that he would sometimes run away or be kicked out of the house. Though he had a "rocky" relationship with his adoptive mother, who died in 2001, he stated she was "the only one [he] ever had." Defendant was suspended and expelled from schools, but thought he graduated from high school. In prison, he learned he did not have enough credits. He stated that he had not repeated any grades, but received special education for emotional behavior disorders beginning in the third grade. Additionally, he had taken some college-level courses while incarcerated.

¶ 17 Defendant stated that he began drinking alcohol daily at age 10, began using marijuana daily at age 11 or 12, and as a teenager used ecstasy three or four times per week. He also relayed that he had been treated by a mental health professional until he was 14 years old as part of his DCFS involvement, and was recommended psychotropic medication but only took it for 7 or 8 months while in prison.

¶ 18 The PSI report noted that defendant had been released from an 8-year prison term 18 days before the present offense and was homeless. He stated that he had no financial support and had not been in contact with anyone in the last nine years. He noted that he had learned skills and worked while in prison in the kitchen, storage, and as a porter. Previously, he had worked as a security guard, cook, stock boy, waiter, janitor, and in construction. Though he had "no idea" about future employment, he planned to "go to college and study architectural drafting."

¶ 19 In aggravation, the State noted that defendant had a history of violent felonies, including armed robbery with a firearm in 2001, with a 3-year sentence; aggravated battery of a police officer in 2004, with a 6-year sentence; three separate convictions for individual armed robberies with a firearm in 2006, with concurrent 12-year sentences; and aggravated battery of a police officer in 2009, with a 3-year sentence. The State added that, had the court not found defendant

guilty of the lesser-included offenses in this case, he would be eligible for a mandatory natural life sentence.

¶ 20 In mitigation, defense counsel noted that defendant was 36 years old at the time of sentencing, had "tried to reach out at different stages of his life" for help upon release from prison, and was frustrated by not having services or family to help him. Though it was "not society's responsibility to make sure that he gets *** help," counsel stated that defendant knew he was at risk and believed he could change. Counsel reviewed defendant's history of neglect from his biological and adoptive parents, and noted the negative impact that his adoptive mother's death had on him. Counsel asked the court to consider defendant's difficult life and hope for "redemption," and to impose the minimum sentence.

¶ 21 In allocution, defendant stated that he "regret[ted] it all."

¶ 22 The trial court sentenced defendant to a Class X sentence of 30 years' imprisonment for kidnapping. The court stated that it read the PSI report, which detailed defendant's difficult life and upbringing, but that he had "a history of violence" and "keeps putting guns in people['s] faces and terrorizing them." According to the court, the surveillance footage of the incident was "terrifying" and depicted "people who didn't know if they were going to live or die." The court reiterated that, while defendant's BB gun was "of some substance," the court had found under "the totality of the circumstances and the interest of justice" that it was not a bludgeon, and therefore, defendant was not subject to life imprisonment. While defendant claimed he was homeless at the time of the incident and needed money, the court stated that it had "an obligation to protect the public" given that he "keeps resorting to these brazen, bold stickup's [*sic*] where he is terrorizing people."

¶ 23 Defense counsel made an oral motion to reconsider sentence. The State did not object to the oral motion, which the trial court denied.

¶ 24 On appeal, defendant first argues that his sentence is excessive because the court did not adequately weigh the mitigating factors, abused its discretion by not sentencing him with the aim of rehabilitation, and considered improper aggravating factors.

¶ 25 As a preliminary issue, the State contends that defendant forfeited his claim of sentencing error because he made an oral motion to reconsider the sentence and did not file a written motion. Generally, both a contemporaneous verbal objection and a written postsentencing motion are required to preserve a sentencing issue for review. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). However, the requirement for a written motion is waived where the defendant makes an oral motion to reconsider his sentence and the State does not object. *People v. Shields*, 298 Ill. App. 3d 943, 950 (1998). Here, the State did not object to defendant's oral motion to reconsider the sentence. Therefore, we address defendant's claim on the merits. *Id.* at 950-51.

¶ 26 In sentencing, the objective of restoring the offender to useful citizenship must be balanced against the seriousness of the offense. Ill. Const. 1970, art. I, § 11; *People v. Miller*, 202 Ill. 2d 328, 337-38 (2002). The trial court has broad discretionary powers in imposing a sentence (*People v. Stacey*, 193 Ill. 2d 203, 209 (2000)), and is given substantial deference because of its ability to observe the defendant's credibility, demeanor, moral character, mentality, environment, habits, and age. *People v. Snyder*, 2011 IL 111382, ¶ 36. A sentence is therefore presumed proper when it falls within statutory guidelines (*People v. Knox*, 2014 IL App (1st) 120349, ¶ 46), and will only be disturbed "if the trial court abused its discretion in the sentence it imposed" (*People v. Jones*, 168 Ill. 2d 367, 373-74 (1995)). Sentences which are

" 'greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense' " are considered an abuse of discretion. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010) (quoting *People v. Stacey*, 193 Ill. 2d 203, 210 (2000)). However, a reviewing court must not substitute its judgment for that of the trial court merely because it may have weighed the factors differently. *People v. Fern*, 189 Ill. 2d 48, 53 (1999).

¶ 27 A reviewing court presumes the trial court properly considered all mitigating factors and the defendant's rehabilitative potential, and " 'the burden is on the defendant to affirmatively show the contrary.' " *People v. Brazziel*, 406 Ill. App. 3d 412, 434 (2010), (quoting *People v. Garcia*, 292 Ill. App. 3d 769, 781 (1998)). Additionally, neither a defendant's rehabilitative potential nor the presence of mitigating factors are entitled to greater weight than the seriousness of the offense (*People v. Reed*, 2018 IL App (1st) 160609, ¶ 62), which is the most important factor in determining an appropriate sentence (*People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002)). "[T]he presence of mitigating factors requires neither a minimum sentence nor precludes a maximum sentence." *People v. Jones*, 2014 IL App (1st) 120927, ¶ 55.

¶ 28 Kidnapping is a Class 2 felony (720 ILCS 5/10-1 (West 2014)), with a sentencing range of three to seven years (730 ILCS 5/5-4.5-35(a) (West 2014)). Here, defendant's criminal history made him eligible to be sentenced as a Class X offender with a range of 6 to 30 years. 730 ILCS 5/5-4.5-25(a) (West 2014). Because defendant's 30-year sentence falls within these statutory guidelines, we must presume it is proper. *Knox*, 2014 IL App (1st) 120349, ¶ 46.

¶ 29 The trial evidence showed that defendant entered the Game Stop with his face covered, displayed a BB gun, and ordered Zavala and Andrade to give him money from the cash registers and safe. He held the BB gun against Zavala's ribcage, and told Zavala and Andrade to follow

his orders so he would not "have to put a bullet" in them. Zavala testified that he thought the BB gun was an actual firearm and that he was afraid of being shot. Defendant asked whether anyone was watching the store via a live feed, and ordered Andrade to close and lock the doors and disconnect the phone line. Then, defendant ordered Zavala to retrieve his vehicle and load it with merchandise. Zavala complied because Andrade was still in the store. Walker, who responded to the robbery and barricaded defendant in the store, also believed defendant had a real firearm and feared he would shoot through the door. After his arrest, defendant confirmed that he planned the robbery, wanted Zavala and Andrade to believe he had a real firearm, and intended to steal Zavala's vehicle. Defendant's criminal history included four armed robberies and two aggravated batteries of police officers, for which he had been sentenced to three and six-year prison terms. The trial court explained that surveillance footage of the present offense was "terrifying" and that, during the incident, Zavala and Andrade "didn't know if they were going to live or die." In imposing defendant's 30-year sentence, the court explained that it had an "obligation to protect the public" because he "keeps resorting to these brazen, bold stickup's [*sic*] where he is terrorizing people."

¶ 30 Initially, defendant contends that the 30-year sentence was disproportionate to the offense's minimal nature, as no one was hurt, he did not use a real firearm, and never intended anyone harm. Although defendant claims these circumstances show the offense was not serious, the trial court is presumed to have taken that information into account (*People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 19), and balanced it against other relevant considerations. The court found that defendant terrorized the victims, an observation grounded in the fact that he threatened to shoot Zavala and Andrade, made Zavala fear leaving Andrade behind, and ordered

Andrade to lock the doors and disconnect the phone line, affording them no opportunity to escape. From these facts, the court could conclude that defendant's conduct was, in fact, serious even if the victims were not physically injured.

¶ 31 Relatedly, defendant maintains that the court placed too much weight on incapacitating him, protecting the public, and his criminal history in aggravation. The court noted that it read the PSI report, detailing defendant's difficult life and upbringing, his education, and employment efforts. The court balanced that information against defendant's history of violence, and its obligation to protect the public given defendant's recidivism. Defendant asks that this court re-weigh the evidence. However, considering the record as a whole, there is no indication that the trial court inappropriately weighed the aggravating factors, and this court will not substitute its judgment for that of the trial court. *Fern*, 189 Ill. 2d at 53.

¶ 32 Defendant also maintains that the trial court did not adequately weigh the evidence in mitigation, including his childhood abuse, alcoholism and drug use, mental illness, and limited treatment opportunities. However, such information was before the court and it is presumed to have properly considered all mitigating factors, absent defendant's affirmative showing to the contrary. *Brazziel*, 406 Ill. App. 3d at 434. Here, defendant made no such showing. Rather, this information was discussed in detail in the PSI report and counsel's argument in mitigation, and we will not substitute our judgment for that of the trial court by reweighing it on review. *Id.* Furthermore, information about a defendant's mental or psychological impairment is not inherently mitigating. *People v. Coleman*, 183 Ill. 2d 366, 406 (1998). The court can consider the information either mitigating or aggravating, demonstrating possible future dangerousness. *Id.* Here, defendant's possible future dangerousness was shown by his having consistently

committed armed robberies and aggravated batteries leading up to the present offense. Under these circumstances, the trial court did not abuse its sound discretion in weighing the factors in aggravation.

¶ 33 Defendant next contends that the trial court did not fashion his sentence with a rehabilitative purpose, as the court did not expressly address his desire for treatment, need for post-release services, and educational efforts while in prison. However, the trial court is neither required to articulate the process by which it determines the appropriateness of a given sentence (*People v. Wright*, 272 Ill. App. 3d 1033, 1045-46 (1995)) nor to give greater weight to the defendant's rehabilitative potential than to the seriousness of the offense (*Reed*, 2018 IL App (1st) 160609, ¶ 62). Defendant claims that he only committed the robbery because he lacked support outside of prison. However, given defendant's history of recidivism and violent crimes, the trial court could have reasonably concluded that the need to protect the public outweighed the goal of rehabilitation. *People v. Hindson*, 301 Ill. App. 3d 466, 475 (1998) ("The seriousness of the offense or the need to protect the public may outweigh mitigating factors and the goal of rehabilitation.").

¶ 34 Additionally, defendant claims that there are "serious questions about [his] mental state" as demonstrated by the poorly conceived nature of the present offense, and the fact he previously tried to rob the restaurant he worked at four times. However, the court heard the evidence at trial, defendant's PSI report advised the court of his history of mental illness, and the court was free to weigh this information alongside all the other mitigating and aggravating factors. Moreover, defendant's PSI was unclear about what, if any, mental health issues defendant demonstrated at the time of the offense. Though he was treated by a mental health professional until he was 14

years old, and recommended to take psychotropic medication, he only took the medication for 7 or 8 months during a previous prison term. Moreover, while defendant received special education for emotional behavior disorders, he never repeated a grade, took college level courses in prison, and was capable of working in various capacities. We cannot find under these circumstances that the court abused its sound discretion in weighing his rehabilitative potential in fashioning his sentence.

¶ 35 Next, defendant argues that the trial court relied on several improper factors in aggravation. The trial court's consideration of an improper factor in aggravation when imposing a sentence is an abuse of discretion. *People v. Minter*, 2015 IL App (1st) 120958, ¶ 147. The issue of whether the court considered an improper factor is a question of law reviewed *de novo*. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 49.

¶ 36 First, defendant contends the court relied on facts pertaining to his prior offenses which were not in evidence in the present case. In particular, he claims that the court's statement that "he keeps putting guns in people[']s faces and terrorizing them" shows that the court relied on its personal recollection about evidence from defendant's previous cases in which the court presided. However, in determining whether the trial court based its sentence on proper aggravating and mitigating factors, we " 'consider the record as a whole rather than focusing on a few words or statements by the court.' " *People v. Harmon*, 2015 IL App (1st) 122345, ¶ 125 (quoting *People v. Dowding*, 388 Ill. App. 3d 936, 943 (2009)). Here, there was no indication that the trial court was referring to any of defendant's prior offenses and trials in particular, but rather to defendant's general history of committing armed robberies.

¶ 37 Defendant also maintains that the trial court improperly assumed that the victims in this case were "terrorized" and relied on its own reaction to the events depicted in the surveillance video, which, according to the court, showed that Zavala and Andrade "didn't know if they were going to live or die."

¶ 38 Trial courts have a duty to weigh all statutory factors in aggravation and mitigation, including the effect of the crime upon the victim. *People v. Pavlovskis*, 229 Ill. App. 3d 776, 784 (1992). "[T]he probability of permanent psychological harm to the victim is an important sentencing factor." *People v. Fisher*, 135 Ill. App. 3d 502, 506 (1985). Although the court cannot base a sentence on a "vague guess about generalized possibilities of harm," the court may consider the possibility of harm to the victim when there is sufficient evidence of the possibility. *People v. Andrews*, 210 Ill. App. 3d 474, 484 (1991).

¶ 39 Here, Zavala and Andrade testified that defendant threatened to put a "bullet in [them]." They were told to close and lock the store's door, and disconnect the phone lines. This supports the court's inference that they "didn't know if they were going to live or die" and were "terrified" and "terrorized." Zavala's testimony expressing his fear of being shot, and yet returning to the store because he did not want to leave Andrade behind, also substantiated the court's inference as to the psychological harm suffered. Both Zavala and Walker testified that they believed the firearm was real, and Walker, a police officer, added that he worried defendant might shoot through the door he was barricading. Based on the trial evidence and the context of the court's statements, defendant's argument is without merit.

¶ 40 In sum, we conclude that the record, considered as a whole, shows that the trial court did not consider any improper factors in aggravation during sentencing, and therefore, committed no

error. Though 30 years' imprisonment is the maximum sentence within a Class X felony statutory sentencing range, the court properly exercised its discretion as the term is not manifestly disproportionate to the nature of the offense, and is not at great variance with the spirit and purpose of the law in view of all the mitigating and aggravating factors.

¶ 41 Finally, defendant argues that the PSI was inadequate as it lacked any information about "resources within the community which might be available to assist [his] rehabilitation." 730 ILCS 5/5-3-2(a)(2) (West 2014).

¶ 42 Defendant acknowledges that he failed to preserve this issue at trial. *People v. James*, 255 Ill. App. 3d 516, 529-30 (1993) (although a PSI and report are "mandatory legislative requirements *** any objection to a deficiency in that report is deemed waived by a defendant's failure to object"). However, defendant contends that it is reviewable as plain error. Under the plain-error doctrine, a reviewing court may consider a forfeited claim of sentencing error when: "(1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing." *Hillier*, 237 Ill. 2d at 545.

¶ 43 Here, the evidence was not closely balanced. Evidence is closely balanced when it is close enough that the error may have affected the outcome. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). The witnesses' testimony, the video of the incident, and the evidence presented in aggravation at sentencing, including defendant's history of armed robberies and aggravated batteries, all contradicted defense counsel's argument in mitigation that defendant would be amenable to reintegration services. Thus, the fact that the PSI report did not mention particular programs which could have helped defendant with his housing, mental health, and education upon release from prison does not suggest that the evidence at sentencing was close or that the

trial court had no option but to impose the maximum sentence. To the contrary, such information would not have altered the seriousness of the offense or defendant's criminal history, which as we have explained, supported the sentence imposed.

¶ 44 Additionally, the information missing from the PSI report was not so fundamental that defendant's right to a fair sentencing hearing was denied. *People v. Stewart*, 365 Ill. App. 3d 744, 748 (2006). The PSI report was adequate in that it contained the defendant's criminal history, physical and mental history and condition, current family status and background, economic status, education, occupation and personal habits, and the defendant's status since arrest. 730 ILCS 5/5-3-2 (West 2014). Moreover, the trial judge considered more than the PSI report, including defense counsel's argument in mitigation, which as noted, was contravened by the evidence in aggravation. Thus, neither prong of the plain-error doctrine is satisfied, and defendant's waiver of this issue will be honored.

¶ 45 Furthermore, because the evidence at sentencing was not closely balanced and defendant was not denied a fair sentencing hearing, we also reject his claim that trial counsel was ineffective for failing to apprise the court of the information missing from the PSI report. To establish ineffective assistance of counsel, defendant must prove both that counsel's performance was deficient and that he was prejudiced by counsel's subpar performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). As defendant was not prejudiced by the PSI report received by the court, his claim for ineffective assistance necessarily fails.

¶ 46 For all the foregoing reasons, the judgment of the trial court is affirmed.

¶ 47 Affirmed.